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No. 84-1029 (2)

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JUAN INOSENCIO, et al,

Petitioners,

v

PERRY JOHNSON, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

THE GRANTING OF CERTIORARI IS INAPPROPRIATE WHERE THE LAW CONCERNING FIRST AMENDMENT AND EQUAL PROTECTION RIGHTS OF PRISON INMATES HAS BEEN SETTLED BY THIS COURT, AND NO CONFLICT EXISTS AMONG THE COURTS OF APPEALS.

II.

THE GRANTING OF CERTIORARI IS INAPPROPRIATE WHERE THE PETITION SEEKS REVIEW OF THE EVIDENCE AND FINDINGS OF FACT.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case involves a challenge to the Michigan prison officials' ban on congregate worship services at the State Prison of Southern Michigan, by the Detroit Metropolitan Community Church.

The Detroit Metropolitan Community Church attempts to meet the spiritual needs of homosexual persons, including those who are incarcerated. The church was recognized as representing a bona fide religion by prison officials in 1976, and was allowed to meet with inmates on an individual basis and to mail religious literature to them (Court of Appeals Opinion of September 11, 1984, page 2, Petitioner's Appendix).

However, because the prison officials believed that group worship services for homosexual inmates at the State Prison of Southern Michigan prison facility would constitute a threat

to prison security, a ban on congregate services was imposed (*Id*).

Considerable testimony was presented in 1982 in the District Court following a remand in a prior appeal (*Inosencio* v *Johnson*, 658 F2d 418 (6th Cir, 1981). On remand prison officials established the factual basis for their conclusion that security would be threatened by allowance of congregate worship services for homosexual inmates (Court of Appeals' Opinion of September 11, 1984, at pages 6-7; District Court Opinion of September 15, 1982, at pages 15-23, Petitioner's Appendix).

Petitioners attempted to demonstrate, through testimony from Ruth Rushen (Director of the California Department of Corrections), that congregate worship services for homosexual inmates had not led to increased security risks at certain prison facilities in California, therefore the Michigan prison officials' ban constitutes an exaggerated and unfounded response (District Court Opinion, at pages 23-24).

However, the testimony of Ruth Rushen was rebutted by testimony demonstrating substantial differences between the California prison facilities and the one Michigan facility which was the subject of this lawsuit (State Prison of Southern Michigan) (*Id.* at pages 24-28). Even Petitioners' witness (Rushen) admitted that a security threat could be demonstrated at the California facilities (Folsom and San Quentin) most comparable to the Michigan facility (State Prison of Southern Michigan) (*Id* at page 26).

Because of the substantial factual basis supporting the prison officials' belief that prison security would be threatened by congregate worship services for homosexuals, and the obvious factual dissimilarity between the attempted comparison of the California facilities which allow group services for

homosexuals and the one Michigan facility (SPSM) which did not, the District Court granted final judgment to the Respondents and the Sixth Circuit affirmed that judgment.

REASONS FOR DENYING THE WRIT

I.

THE GRANTING OF CERTIORARI IS INAPPROPRIATE WHERE THE LAW CONCERNING FIRST AMENDMENT AND EQUAL PROTECTION RIGHTS OF PRISON INMATES HAS BEEN SETTLED BY THIS COURT, AND NO CONFLICT EXISTS AMONG THE COURTS OF APPEALS.

This Court's decisions pertaining to the First Amendment and Equal Protection rights of prisoners are not in short supply. Cases such as *Bell* v *Wolfish,* 441 US 520 (1979), *Pell* v *Procunier,* 417 US 817 (1974), *Cruz* v *Beto,* 405 US 319 (1972), and *Jones* v *North Carolina Prisoners Labor Union, Inc.,* 433 US 119 (1977), and more recently *Hudson* v *Palmer,* —— US ——; 104 S Ct 3194; 82 L Ed 2d 393 (1984), have made the contours of prisoner rights relatively clear. While prisoners retain certain constitutional rights, those rights must be balanced with the prison officials' goals of maintaining security and preserving internal order and discipline.

The prison officials' goal of maintaining prison security and discipline has been recognized by itself as a compelling state interest. See *Lipp* v *Procunier,* 395 F Supp 871 (ND Cal, 1975). The prison officials in the present action established factually that there was a substantial basis for their judgment that the ban on homosexual congregate worship services was necessary to maintain prison security and discipline. Obviously, Petitioner disagrees with that factual find-

ing and now asks this Court to grant the Petition for Writ of Certiorari for legally insufficient reasons.

Petitioner contends that certiorari is appropriate because there exists a conflict among a 1975 three-judge District Court for Northern California (see *Lipp* v *Procunier, supra*) and the decision below. This contention is specious when the decisions are subjected to even cursory review. In *Lipp* v *Procunier, supra,* the court, after first establishing that the church espoused and taught a bona fide religion (which was not an issue in this case), proceeded to the issue which is the essence of this case: whether the prison authorities' restriction on homosexual congregate worship services was reasonable and necessary in the administration, maintenance of discipline and control of dangers and hazards presented. *Cruz* v *Beto, supra,* was primarily relied upon for the above proposition. *Lipp* v *Procunier, supra,* at 877.

The *Lipp* court said that the appropriate test:

> ". . .requires the prison authorities to show that the Ban subjugating the freedom is reasonably necessary to promote a 'compelling state interest.'"
>
> *Id.* at 877.

Furthermore, the court in *Lipp* v *Procunier, supra,* made it clear that the:

> ". . .orderly administration of the penal laws of a given state, which necessarily includes *an orderly administration of prison population and control of hazards and dangers to inmates and property is of itself indisputably a compelling state interest of that state.*" (Emphasis added).
>
> *Id.* at 877.

Finally, since this issue was in the words of the *Lipp* court a question of fact, the court could not render a decision on this issue until further evidence was developed. The court made the following observation:

> "Whether the proclivities, habits or inclinations of an individual or group of prison inmates to act present a clear and present danger to prison discipline and control of prison safety to persons and property is a question of fact; first, to be determined and asserted by prison authorities, and second, if contested, by appropriate fact finding procedure. *By the very nature of an orderly prison population, the expertise of prison officials must be given more than mere credibility and deference.*" (Emphasis added).
>
> *Id.* at 877.

There was never a subsequent evidentiary hearing in *Lipp* on this issue. Instead, the prison authorities negotiated a consent judgment without admitting liability. *Lipp* v *Procunier*, 402 F Supp 623 (ND Cal, 1975).

When the first appeal in the present case was taken to the Sixth Circuit, the Court vacated the District Court's summary judgment in the Defendants' favor and said:

> "In this appeal plaintiffs contend that the district court erred in granting summary judgment. We agree. In *Lipp* v *Procunier*, 395 F.Supp 871 (N.D.Cal.1975), a case which involved similar issues, a three-judge district court denied a similar summary judgment motion. In this case the plaintiffs should be given an opportunity to present evidence concerning the effect of the church's congregational services in prison and on the treatment of the church's ministers in prison.
>
> *Inosencio* v *Johnson*, 658 F 2d 418, 419 (6th Cir, 1981).

Obviously, the Court of Appeals did not shun the *Lipp* decision, but rather accepted the propositions set forth in the decision and remanded for fact-finding purposes. In *Lipp* there was no evidentiary record. In this case there is. There simply is no basis for the Petitioner to assert that a conflict exists among the Courts of Appeals, at least with respect to the *Lipp* decision and the instant petition. That Petitioner disagrees with the factual findings reached by both courts below does not, as shown in the next argument, provide a sufficient basis to have this Court review the present case.

II.

THE GRANTING OF CERTIORARI IS INAPPROPRIATE WHERE THE PETITION SEEKS REVIEW OF THE EVIDENCE AND FINDINGS OF FACT.

It appears that the Petitioner wishes this Court to ignore the well established principle that the United States Supreme Court does not grant certiorari to review evidence and discuss specific facts. *United States* v *Johnston*, 268 US 220, 227 (1925).

As previously indicated in the counterstatement of facts, Respondents ultimately prevailed because of the *facts* that were established at the evidentiary hearing. These facts were deemed sufficient by the fact finder (the District Court), to establish that the ban imposed on congregate worship services was necessary to prison security, discipline and safety of the inmates and was neither unreasonable nor exaggerated (District Court Opinion at pages 28-30; Court of Appeals' Opinion of September 11, 1984, at page 7).

Petitioner devotes considerable attention in his Petition to testimony from his witness which supposedly demonstrates

that the facts and the record are somehow insufficient to support the legal conclusions reached. However, it is evident that the factual findings made in this case are sufficient to withstand any test Petitioner advances because:

1. prison security, discipline and safety is a question of fact.

2. The ". . .orderly administration of prison population and control of hazards and dangers to inmates and property is of itself indisputably a compelling state interest of that state;" and,

3. ". . .the expertise of prison officials must be given more than mere credibility and deference."

Lipp v *Procunier*, at 877.

Finally, the Petitioner suggests that the issue involving state preference of one denomination over another was also erroneously decided, contending the facts in this case really support a different conclusion than that reached by the District Court and the Court of Appeals. (See pages 22 and 23 of Petition). Once again, the Petitioner improperly suggests that his interpretation of the facts — which both the District Court and Sixth Circuit rebuffed — somehow provides a basis for second-guessing by this Court.

CONCLUSION AND RELIEF SOUGHT

Because of the absence of a substantial question of law or conflict among appellate panels, as well as the obvious attempt to seek review of factual findings to which the Petitioner disagrees, the present Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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